

(1995) 02 GUJ CK 0017
In the Gujarat High Court

Meghdev Enterprises and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 17-02-1995

Acts Referred:

Central Excise Rules, 1944 — Rule 57E
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151
Constitution of India, 1950 — Article 226

Citation : (1996) 1 GLR 662

Hon'ble Judges : J.N. Bhatt, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—In all these petitions the principal question raised as regards entitlement to claim refund of the amount of excise duty paid on account of wrong classification of the article manufactured by the petitioners, i.e., decorative laminated sheets, is common. Moreover, as submitted by the Learned Counsel for the parties, the facts in all the cases are almost similar. Therefore, at the request and with the consent of the learned Advocates appearing for the parties, all these petitions are ordered to be heard together.

2. Decorative laminated sheets were subject to excise duty under tariff item No. 68 of the First Schedule to the Central Excises and Salt Act, 1944 upto February 28, 1986. Central Excise Tariff Act, 1985 came into force on February 28, 1986. Therefore, from March 1, 1986 classification of the article was required to be made as per the Schedules provided in the Central Excise Tariff Act, 1985. According to the petitioners their product was paper based decorative laminated sheets and not plastic based. Therefore, they classified their product under Chapter 48 Sub-heading 4818.90 upto February 28, 1988. Thereafter, from March 1, 1988 the product was classified under Sub-heading 4823.90 of the Schedule to the Central Excise Tariff Act, 1985. The petitioners filed classification list before the Assistant Collector accordingly. The Assistant Collector did not approve the same and held that the product manufactured by the petitioners was falling under Chapter 39 of the Schedule to the Central Excise Tariff Act, 1985,

which dealt with plastics and articles thereof. Therefore, the petitioners contend that they started paying the duty of excise under protest. In some cases the dispute as regards classification appears to have been carried upto Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) and thereafter upto the Supreme Court before which the appeals filed by the Department against the decision of CEGAT classifying the article under sub-heading 4818.90 upto February 28, 1988 and under sub-heading 4823.90 from 1-3-1988 has been challenged. It is also an undisputed position that the appeals have been admitted by the Hon''ble Supreme Court and they are pending before the Hon''ble Supreme Court. Thus, the dispute with regard to classification of the article in question has still not become final.

3. Special C.A. No. 959 of 1990:

The petitioners had filed classification list on August 22, 1986 which was disapproved by the Assistant Collector by his order dated May 5, 1987. Appeal was preferred by the petitioners before the Collector. The Collector (Appeals), as per his order dated September 9, 1988 held that the product was classifiable under subheading No. 4811.39. Against this order both the Department and the petitioners filed appeal before CEGAT being appeal No. E/3521/88-C and E-3257/87-C respectively. CEGAT decided the appeals along with other appeals filed by different manufacturers and the Department, as per judgment and order dated October 4, 1989. CEGAT held that the product was classifiable under sub-heading 4818.90 upto February 28, 1988 and under sub-heading 4823.90 from 1-3-1988. General direction given by CEGAT as regards consequential relief will be reproduced hereinbelow.

3.1. The petitioners filed claim on March 7, 1989 before the Assistant Collector and requested for grant of refund of the amount of duty which was paid under protest for the period commencing from August 22, 1986 to February 9, 1989. The petitioners reiterated the request to grant refund on December 27, 1989. Again in February 6, 1990 the petitioners reiterated the request for grant of refund. The petitioners filed this petition on February 9, 1990 and prayed to issue "writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction directing to refund the amount of Rs. 1,36,84,418.65." The petitioners also prayed for interim relief directing to refund the aforesaid amount together with interest at the rate of 18% per annum. In the body of the petition also claim for interest at the rate of 18% per annum is made.

3.2. By the interim order passed by this Court (Coram: G.T. Nanavati, J., as he then was and J.U. Mehta, J.) on February 19, 1990, the respondents were directed to pay the amount of refund of Rs. 1,36,84,418.65 ps. (Rupees one crore thirty-six lakhs eighty-four thousand four hundred and eighteen and paise sixty-five only) to the petitioners. The Court at the interim stage observed that the petitioners claimed Rs. 1,36,84,418.65 ps. with interest at the rate of 18%. However, the Court felt it just and proper at that stage to direct the respondents to refund only the principal amount on the conditions mentioned in the order.

Pursuant to the mandatory direction given by the Court, the amount of refund of Rs. 88,66,022.74 has been paid to the petitioners in cash and credit of Rs. 33,23,107.98 has been given. This order has been passed by the Assistant Collector on April 6, 1990. Against the said order the Department has preferred appeal before the Collector (Appeals) who rejected the appeal preferred by the Department as per order dated September 24, 1992. Against the said order the Department filed appeal before CEGAT and the same is pending.

4. Special C.A. No. 960 of 1990:

In the instant case also the petitioners had classified their product under subheading 4818.90 from March 1, 1986. They straight away filed refund claim on September 1, 1986 for the period commencing from March 1, 1986 to August 31, 1986. The Assistant Collector, vide his order dated December 17, 1987 disapproved the classification and ordered classification of the article manufactured by the petitioners under sub-heading 3920.31. Against the said order appeal was preferred before the Collector (Appeals). The Collector (Appeals), as per order dated 14th April, 1989 classified the product under sub-heading 4818.90 and directed to grant consequential relief. On March 5, 1989 the petitioners filed refund claim for the period commencing from September 1, 1986 to January 31, 1989. Thereafter, the petitioners made reminders to the departmental authorities. But the amount of refund was not granted. Hence the petition was filed on February 9, 1990. The petitioners prayed "to issue writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing refund of the amount of Rs. 60,34,350.65 together with interest at the rate of 18% per annum". On February 19, 1990 the Division Bench of this Court (Coram: G.T. Nanavati, J. as he then was and J.U. Mehta, J.) directed the Department to pay principal amount of duty, i.e., Rs. 60,34,350.65 (Rupees sixty lakhs thirty-four thousand three hundred fifty and paise sixty-five only) to the petitioners. At that stage the Court thought it proper not to pass any order as regards interest claimed at the rate of 18% per annum. The Court gave mandatory direction to pay the amount of refund on the conditions mentioned in the order. The Assistant Collector, vide order dated February 4, 1990 granted refund of the amount of Rs. 43,02,170.31 in cash and granted credit of Rs. 16,82,227.00 to the petitioners.

5. Special C.A. No. 965 of 1990:

In this case the petitioners classified their article under sub-heading No. 4818.90 which was disapproved by the Assistant Collector vide his order dated December 15, 1987. The matter was carried in appeal before the Collector (Appeals) who classified the article under sub-heading No. 4811.39, as per order dated November 30, 1988. Both the Department and the petitioners filed appeal before CEGAT against the order of the Collector (Appeals). The petitioners filed appeal No. E/229/89-C while the Department filed appeal No. E/472/89-C. CEGAT, by common judgment delivered in a group of matters on October 4, 1989, held that the classification of the product was under sub-heading 4818.90 upto 28-2-1988

and under sub-heading 4823.90, from March 1, 1988. CEGAT also directed to grant consequential relief within three months.

5.1. The petitioners filed refund claim on October 20, 1989 before the Department. According to the petitioners, since the refund claim was not decided the petitioners approached this Court. On February 19, 1990 Division Bench of this Court (Coram: G.T. Nanavati, J. as he then was and J.U. Mehta, J.) passed mandatory order at interim stage and the principal amount of Rs. 83,49,099.65 ps. (Rupees eighty-three lakhs forty-nine thousand ninety-nine and paise sixty-five only) was ordered to be paid to the petitioners on the terms and conditions mentioned in the order. However, the Court observed that at that stage the claim of interest at the rate of 18% per annum be not granted. The petitioners had filed Misc. Civil Application No. 70 of 1990 in this very Special Civil Application. According to them there was confusion with regard to the amount inasmuch as instead of Rs. 93,44,771.70 ps. figure of Rs. 83,49,099.65 ps. was mentioned in the order. However, the Court disposed of the application by keeping it open for the petitioners to convince the Department about the amount and the Department to verify the amount. In the instant case, it appears that mere does not seem to be any order passed by the Department granting refund. However, there is no dispute with regard to the fact that the amount of refund has been received by the petitioners as per the mandatory direction given by this Court.

6. Special C.A. No. 1112 of 1990:

In this petition also there was dispute with regard to classification of the article. The Assistant Collector disapproved the classification as per his order dated July 26, 1988. The petitioners preferred appeal before the Collector (Appeals) who decided the appeal in favour of the petitioners and ordered to classify the product under sub-heading 4848.90 as per his order dated March 29, 1989. Therefore, the petitioners filed claim for refund of duty paid by them from March 1, 1986 to September 1, 1986. Further claim for refund was filed on April 24, 1989 claiming for refund of duty paid from September 22, 1986 to February 3, 1989.

6.1. The Department as well as the petitioners filed appeal before CEGAT. CEGAT decided the appeals together with other appeals filed by the manufacturers as well as the Department as per order dated October 4, 1989. The petitioners filed this petition on February 16, 1990 and prayed to issue "a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondents to refund the amount of Rs. 95,30,104.24 together with interest at the rate of 18% per annum from the date of payment till the amount is refunded". After the mandatory direction given by this Court, the Assistant Collector, as per his order dated April 6, 1990 granted cash refund of Rs. 56,02,549.01 (Rupees fifty-six lakhs two thousand five hundred forty- nine and paise one only) and granted credit of Rs. 17,09,739.40 (Rupees seventeen lakhs nine thousand seven hundred thirty-nine and paise forty only) to the petitioners. Against the said order the Department as well as the petitioners filed

appeal before the Collector (Appeals) which were dismissed vide order dated September 8, 1992. Against the said order the Department has preferred appeal before CEGAT and the same is pending.

7. Special C.A. No. 5096 of 1990:

The petitioners filed classification list on September 22, 1986 classifying the article decorative laminated sheets under sub-heading 4818.90 and industrial laminated sheets under sub-heading 8546.90 and protested payment of duty under Chapter 39. The Assistant Collector, as per his order dated September 1, 1988, disapproved the classification and held that the products were classifiable under Chapter 39. The petitioners preferred appeal before the Collector (Appeals) who decided in favour of the petitioners as per order dated March 21, 1989, and directed that decorative laminated sheets be classified under sub-heading 4848.90 and industrial laminated sheets under sub-heading 8546.00. The Collector (Appeals) also directed to grant consequential relief. The department preferred appeal No. E/2499/89-C before CEGAT and challenged the order passed by the Collector.

7.1 On March 29, 1989 the petitioners filed refund claim for the period commencing from March 1, 1986 to January 31, 1989, pursuant to the order passed by the Collector (Appeals). The Assistant Collector rejected the refund claim as per his order dated June 26, 1989. The Collector (Appeals), as per order dated September 28, 1989 allowed the appeal filed by the petitioners against the order rejecting the refund claim passed by the Assistant Collector. CEGAT, by common order dated October 4, 1989 disposed of a group of appeals (Appeal Nos. 552 to 572/89-C) and held that the decorative laminated sheets were classifiable under sub-heading 4848.90 upto February 2, 1988 and under 4823.90 from March 1, 1988. The Tribunal also directed that the industrial laminated sheets were classifiable under sub-heading 8546.00. The petitioners tried to receive the amount of refund pursuant to the aforesaid order by approaching one or the other authorities. Ultimately, on July 13, 1990 the petitioners filed the present petition praying for "a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondents, their servants, agents and officers to refund the amount of Rs. 2,02,36,309.19 (Rupees two crore two lakhs thirty-six thousand three hundred nine and paise nineteen only) with interest at the rate of 18% per annum from the date of payment till the date of realisation". Division Bench of this Court (Coram: P.R. Gokulakrishnan, C.J. and R.K. Abichandani, J.), as per order dated July 30, 1990, gave mandatory direction to the Department to make payment of the amount of Rs. 2,02,36,309.19 (Rupees two crore two lakhs thirty-six thousand three hundred nine and paise nineteen only). The Division Bench referred to the interim mandatory orders passed by earlier Division Bench in Special Civil Application No. 959 of 1990 and passed interim order giving mandatory directions on similar terms. 8. While granting interim relief as per the mandatory directions referred to hereinabove, the Division Bench of this Court

imposed condition upon the petitioners as regards furnishing bank guarantee for a limited period. If the respondents did not file appeal and obtain any stay order from the Hon'ble Supreme Court against the decision of CEGAT as regards classification of the article manufactured by the petitioners within the stipulated time, the bank guarantees were not required to be continued. In that eventuality the petitioners were to file undertaking of the respective petitioner-Company and its Directors to refund the amounts to the respondents in case the petitioners lose in these petitions.

8.1. In Special Civil Application No. 959 of 1990 the petitioners filed undertaking dated February 19, 1990. However, the same was not in terms of the order passed by the Division Bench. The petitioners were, therefore, directed to file undertaking latest by December 12, 1994 in terms of the order dated February 19, 1990. Petitioner No. 1-firm and its partners filed undertaking on December 10, 1994 and have undertaken to refund the amount received by them to the respondents in case they lose in the petition.

8.2. In Special Civil Application No. 960 of 1990, though the petitioners received the amount, no undertaking was filed till December 8, 1994. It was submitted that the undertaking was filed earlier. Thereupon the Learned Counsel for the petitioners was handed over the entire record of the Court. But he was not able to point out any such undertaking from the record of the petition, nor any proof of undertaking having been filed earlier was produced. Ultimately, undertaking dated December 9, 1994 was filed. Again, that was not in terms of the interim order passed by this Court. Therefore, further undertaking has been filed by the petitioners on December 10, 1994. By this undertaking the petitioner-Company and its Directors have undertaken to refund the amount received by the petitioners pursuant to the interim order dated February 19, 1990 passed by this Court.

8.3. In Special Civil Application No. 965 of 1990 no undertaking was filed by the petitioners pursuant to the interim order dated February 19, 1990. Initially the petitioners filed undertaking dated December 10, 1994 which was not in terms of the order passed by the Division Bench of this High Court. Proper undertaking has been filed by the petitioners on December 13, 1994.

8.4. Special Civil Application No. 1112 of 1990, came up for hearing on December 8, 1994. On that day, it was found that though the amount was received by the petitioners, no undertaking was filed by the petitioners pursuant to the interim order dated February 22, 1990 passed by the Court. When it was submitted that the undertaking was already filed, Learned Counsel appearing for the petitioners was handed over the entire record of the High Court. He could not point out from the record that any such undertaking was filed. Moreover, no such proof of undertaking having been filed was produced. Ultimately, proper undertaking has been filed on December 10, 1994.

8.5. When Special Civil Application No. 5096 of 1990 came up for hearing on

December 16, 1994 it was pointed out that though the amount was paid to the petitioners vide cheque dated December 20, 1990 no undertaking was filed. Mr. Kamal Trivedi, the Learned Counsel appearing for the petitioners stated that the petitioners were not responding to his instructions and therefore, he did not wish to make any submission in the matter. Therefore, order vacating the interim relief was passed on December 16, 1994. The petitioners were directed to restore the amount of Rs. 2,02,36,309.19 (Rupees two crore two lakhs thirty-six thousand three hundred and nine and paise nineteen only) to the Department immediately. Thereafter, the petitioners filed Civil Application No. 3040 of 1994 praying for modification of order dated December 16, 1994 and restoring the earlier interim relief as per order dated July 30, 1990. It may be noted that vide order dated December 20, 1994 the respondents have attached the goods lying in the factory of the petitioner-Company at Vapi. The petitioners have also produced undertaking which has been executed before Notary Public at Bombay on December 24, 1994. We have heard the Learned Counsel appearing for the parties in the Civil Application and rule was issued which has been directed to be heard with the main matter. Separate order has been passed on Civil Application today, directing to take the undertaking filed by the petitioners on record. It is further directed that the order of attachment of the property belonging to the petitioners shall remain in force, and that the Department may not proceed further pursuant to the order of attachment and for effecting coercive recovery for a period of fifteen days from today.

9. Learned Counsel for the petitioners submit that all these petitions are for seeking compliance of the order of CEGAT and or other departmental authority which passed the order as regards classification of the articles in question. In his submission, as per unamended provisions of Section 11-B(3) of the Act which remained in force upto September 20, 1991, no application for refund of the amount was required to be submitted. In his submission there were three alternatives for seeking refund of the excise duty paid, namely:

(i) seeking refund as per the unamended provisions of Section 11-B(3) of the Act which inter alia provided that when an assessee succeeds in appeal the consequential relief was required to be granted by the officer concerned without insisting upon separate application for refund:

(ii) refund sought on the ground that the amount was paid under mistake of law and the mistake was discovered after lapse of a period; and

(iii) application for refund under the appropriate provisions of the Act or the Rules made within the prescribed period of limitation under the Act or the Rules.

In second type of cases, either a civil suit may have to be filed or a writ petition under Article 226 of the Constitution of India before the High Court could be filed. It is submitted that the present petitions are against the inaction of the departmental authorities in not granting refund pursuant to the order passed in appeal by the appellate authority as regards classification of the articles in

question. In the submission of the Learned Counsel for the petitioners in such cases the doctrine of unjust enrichment could not be applied.

10. In support of this submission reliance is placed on the following decisions:

(i) Bombay Burmah Trading Corpn. Ltd. Vs. Union of India, - (Division Bench) - Writ Petition No. 4983 of 1990 decided on November 14, 1990.

(ii) Amar Dye Chem Ltd. Vs. Union of India, - Division Bench - Writ Petition No. 5004 of 1990 decided on November 12, 1990.

(iii) Titagarh Paper Mills Co. Ltd. Vs. Union of India (UOI), - Single Judge - Application in C.R. No. 10510(W) of 1980 decided on December 18, 1991.

The first two decisions are that of the Bombay High Court. Both the cases have been decided prior to September 20, 1991, the day on which the Amendment Act No. 40 1991 came into force by which the new Section 11-B has been inserted. Therefore, both the aforesaid decisions would not be applicable to the facts and circumstances of this case wherein writ petitions are required to be decided on the basis of the law as it exists today. However, with utmost respect, we may point out that in view of the legal position settled by this Court in the case of Navsari Oil Products Ltd. Vs. Assistant Collector of Central Excise, , we do not agree with the aforesaid Division Bench judgments of the Bombay High Court as regards non-applicability of the doctrine of unjust enrichment in proceedings wherein refund claim is made before the Department and the Department is required to decide the same in accordance with the statute. However, this question directly does not arise in these petitions. The case is required to be decided on the basis of the law as it exists today. In this view of the matter, we do not discuss this point any further.

11. In the case of Titagarh Paper Mills Co. Ltd. (supra), it appears that the Collector (Appeals) had passed order of refund. Since it was not being carried out the High Court of Calcutta appears to have been moved. The High Court directed on August 16, 1991 that the order of the appellate authority be carried out within a period of three weeks. That was not carried out. It was submitted that in view of the amended provisions of Section 11-B which came into force on September 20, 1991 it was not carried out within three weeks as directed. Therefore, application was made by the Department for modification of order dated August 16, 1991 in view of the amending Section 11-B of the Act which has come into force on September 20, 1991. Learned single Judge of the Calcutta High Court came to the conclusion that the amended provisions of Section 11-B had no effect of nullifying the order dated August 16, 1991. Learned single Judge held that the application was mala fide. The learned single Judge also held that the proviso to amended Section 11-B(a) was applicable to the applications for refund which were pending on September 20, 1991 and not to the applications which were already decided earlier. With utmost respect to the learned single Judge of the Calcutta High Court, the view taken by him is contrary to the law laid down by the Hon'ble Supreme Court in the case of Union of India and others Vs. Jain

Spinners Ltd. and another, , and in the case of Union of India and others Vs. I.T.C. Limited, . Principles laid down in the aforesaid decisions will be discussed hereinafter. Therein it is held that the amended provisions of Section 11-B have retrospective operation. Therefore, the aforesaid decision is of no help to the petitioners.

12. Reliance is placed on decision of learned single Judge of the Rajasthan High Court in the case of Adarsh Metal Corporation Vs. Union of India (UOI), . The decision has proceeded on the footing that the amended provisions of Section 11-B which came into force on September 20, 1991 and Chapter 11A incorporating Sections 12A, 12B, 12C and 12D were not retrospective. (See paras 26 and 28 of the report). This is not the correct position of law. The correct position of law has been laid down by the Hon''ble Supreme Court in the case of Jain Spinners (supra) and in the case of I.T.C. Ltd. (supra). In view of this settled legal position this decision is also of no help to the petitioners.

13. It is submitted that the petitioners along with other manufacturers who had filed appeal with regard to classification of the article before CEGAT succeeded before CEGAT. The CEGAT in its common order dated October 4, 1989 gave the direction as follows:

The appeals, which are allowed, are allowed with consequential relief to the appellants, permissible under the Act and Rules, which should be granted within three months from the date of the receipt of the order by the concerned authority. The matters which will go back to the Assistant Collector shall be decided by him within three months from the date of receipt of this order by them after giving an opportunity of personal hearing to the appellant.

On this basis, it was submitted that the petition was for execution of the order passed by CEGAT. Therefore, it is further submitted that the order of refund passed by the departmental authorities, after the interim mandatory order passed by this Court, should not be disturbed, and it should be held as conclusive.

14. The aforesaid submission cannot be accepted. First of all, the very dispute with regard to classification of the article manufactured by the petitioners is pending before the Hon''ble Supreme Court. It is an undisputed position that against the judgment and order passed by CEGAT in a group of matters, appeals are preferred before the Hon''ble Supreme Court (Civil Appeal Nos. 3182 of 1990 to 3202 of 1990), and they are pending before the Hon''ble Supreme Court. Therefore, still there is no finality attached even to the question of classification of the article manufactured by the petitioners. Hence, it is too much to urge that the refund claim which is made and which has been decided pursuant to the interim orders passed by this Court should be treated as final.

15. It must be noted that the departmental authority has passed order granting refund because this Court passed mandatory interim direction. This Court gave direction to grant refund subject to the conditions mentioned in the order.

Initially for a stipulated period the petitioners were required to furnish bank guarantee. The petitioners were also required to file undertaking. Though belatedly, all the petitioners have filed undertaking which are on record. Therefore, the refund orders which have been passed by the departmental authority are subject to the orders that may be passed by this Court in these petitions. Hence, the orders passed by the departmental authorities cannot be treated as final.

16. The very contention that the petitions are in the nature of execution cannot be accepted. We have reproduced the prayer made by the petitioners in each of the petitions. The prayer is for writ or mandamus or appropriate order or direction in the nature of mandamus directing the respondents to make refund of specific amount. The prayer is not for compliance with the order passed by CEGAT. CEGAT has given specific direction making it clear that the appeals were allowed with consequential relief "permissible under the Act and the Rules". Moreover, CEGAT also gave direction to afford an opportunity of personal hearing to the appellants. If the petitions were for execution of the order passed by CEGAT the prayer could have and should have been very simple, to the effect that the respondents be directed to comply with the judgment and order passed by CEGAT and be further directed to make payment of the amount which may be found due and payable pursuant to the direction given by CEGAT. Even if the orders were to be executed the Department would be required to:

- (1) afford an opportunity of personal hearing to the petitioners concerned;
- (2) to verify the claim of the petitioners that they had paid the duty under protest; and
- (3) to verify that the petitioners concerned had complied with the procedure prescribed under Rule 233-B(4) which requires that there should be endorsement to the effect, "duly paid under protest" on all copies of the gate pass, the application for removal and Form R.T. 12 or Form R.T. 13, as the case may be.

The Department would have been obliged to verify as to whether any credit was required to be adjusted as provided under Rule 57E of the Central Excise Rules, 1944. In view of the aforesaid factual position the contention of the petitioners that the petitions are for execution of the order passed by CEGAT cannot be accepted.

17. It is true that one of the basis of the petitions is that the petitioners have succeeded in appeal before CEGAT. But that does not mean that the petitions are for execution of the order passed by CEGAT. This High Court does not sit as an executing Court for seeking execution of the order passed by the Statutory authority. The petitions, as stated hereinabove, are for a writ of mandamus. It may be that grant of writ of mandamus may result into compliance with the order passed by the Statutory authority, but on that ground it cannot be said that the petitions are for execution of the order passed by CEGAT. The petitions, in form as well as in substance are for claiming refund of the amount of excise

duty, which according to the petitioners was erroneously recovered from them on account of wrong classification of their product, i.e., decorative laminated sheets.

18. Learned Counsel for the petitioners submitted that there was no need for making formal application, claiming refund, to the Assistant Collector when the direction of granting consequential relief was issued by the appellate authority. This submission is based on the unamended provisions of Sub-section (3) of Section 11-B of the Act. In support of this submission reliance is placed on the following decisions:

- (i) Wimco Limited Vs. Union of India (UOI), ;
- (ii) D.C.M. Ltd. Vs. Union of India (UOI), ;
- (iii) Union of India and others Vs. Kamlakshi Finance Corporation Ltd., .

In the aforesaid decisions of Allahabad and Rajasthan High Court, the question was with regard to applicability of the unamended provisions of Section 11-B of the Act. Therefore, the decisions are of no help to the petitioners. In the case before the Hon''ble Supreme Court, the Bombay High Court had quashed the order of the Assistant Collector and had directed the Department to allocate the matter to a competent officer to pass appropriate order. Therefore, despite the order having been passed by the Collector (Appeals), the Assistant Collector passed order dated May 12, 1989 reiterating his earlier conclusion. The Assistant Collector did not take into consideration the decision of CEGAT. Thereupon, the assessee had filed writ petition before the High Court. The High Court passed strictures against two Assistant Collectors for flouting the order passed by the Collector (Appeals). In this background the aforesaid judgment is rendered by the Hon''ble Supreme Court. The question as to which provision would be applicable (whether the amended or unamended provisions of the Act) to the claims pending as on September 20, 1991 did not come up for consideration before the Hon''ble Supreme Court. As stated earlier, in the instant case the law applicable would be as amended by the Amending Act No. 40 of 1991. This is so in view of the decision of the Hon''ble Supreme Court in the case of Jain Spinners (supra) and in the case of I.T.C. Ltd. (supra). In view of this settled legal position it is not necessary to discuss the aforesaid decisions relied upon by the Learned Counsel for the petitioners.

19. Learned Counsel for the petitioners submitted that the principle of unjust enrichment is no bar to the amount of refund claimed by the assessee by way of writ petition on the ground that duty was paid by them under mistake of law during the period beyond the period of limitation u/s 11-B of the Act. In support of the aforesaid submission the following decisions have been relied upon:

- (i) Guru Charan Industrial Works Vs. Union of India (UOI) and Others, ;
- (ii) I.T.C. Limited Vs. M.K. Chipkar and others, ;
- (iii) New India Industries Ltd. v. Union of India, reported in 1991 (46) ELT 23

(Bom. - F.B.);

(iv) Assistant Collector of Central Excise, Guntur Vs. Andhra Fertilizer Ltd.,

(v) Union Bank of India and others Vs. Arphi Incorporated,

(vi) Alembic Glass Ltd. v. Union of India, reported in 1990 (48) ELT 323 (Kar.).

However, the aforesaid question does not directly arise in these petitions. Even if the question were to be considered as to whether the doctrine of unjust enrichment would be applicable or not, and as to whether the petitioners claiming restitution on the ground that the amount is paid under mistake of law or under coercion, are required to prove any loss or injury to them, has been decided by series of decisions of this High Court in the following cases:

(1) Union of India v. Tata Chemicals Ltd., reported in 1983 ELT 776 (Guj. - D.B.);

(2) Union of India Vs. New India Industries Ltd., Baroda,

(3) Union of India and Others Vs. Ahmedabad Manufacturing and Calico Printing Co. Ltd. and Others,

On this point law is elaborately discussed by Division Bench of this High Court in the case of Navsari Oil Products Ltd. Vs. Assistant Collector of Central Excise, . In the aforesaid decision, after referring to the observations made by earlier Division Bench of this High Court (Coram: S.B. Majmudar, J. as he then was and A.P. Ravani, J.) in the case of Dhrangadhra Municipality Vs. Dhrangadhra Chemical Works Ltd., and the decision of the Hon"ble Supreme Court in the case of Mahabir Kishore and Ors. v. State of Madhya Pradesh, reported in AIR 1990 SC 303, it is observed that the Hon"ble Supreme Court has held that the principle of unjust enrichment requires (i) that the defendant has been enriched by the receipt of a benefit; (ii) that this enrichment is "at the expense" of the plaintiff; and (iii) that the retention of the enrichment be unjust. Thus, in order to succeed the petitioners or the plaintiff, as the case may be, must prove that the defendant (that is to say, in the case of collection of tax "the State") has been enriched "at the expense" of the plaintiff or the petitioner - meaning thereby the petitioner must establish that he has suffered injury or loss and consequently the defendant has been enriched. In the decision in the case of Navsari Oil Products (supra) the Division Bench of this High Court has considered the entire scheme of the Constitution. The Preamble and Articles 38 and 39 contained in the Directive Principles of State Policy, the provisions of Article 226 and the provisions of Article 265, and Article 296 of the Constitution which refers to the doctrine of escheat and bona vacantia have been considered. In para 16 of the reported decision the Division Bench has observed that if the tax unauthorisedly levied and collected by the State is ordered to be refunded to any intermediary who has not suffered the burden of tax, the consequence would amount to taxing people by the manufacturer, trader or businessman. "Such persons have no authority or power to tax people." If the Court while exercising powers under Article 226 of the Constitution of India directs refund of the amount of tax

collected to the person who has "paid" the tax (but who has not suffered the burden of the tax), it would amount to permitting taxation by private individuals. This could never be done by the Court while exercising powers under Article 226 of the Constitution of India. It would amount to perversion of the Constitution rather than enhancing the objects and ideals of the Constitution.

20. In view of the aforesaid settled legal position, as far as this High Court is concerned, the petitions under Article 226 of the Constitution of India cannot be entertained unless the petitioners prove entitlement to claim refund. Unless entitlement to claim the refund is pleaded there would be no cause of action in favour of the petitioners. There would not be any cause of action in favour of the petitioners unless all the three ingredients stated hereinabove in para 19 are pleaded and proved. This is the position of law laid down by this Court in the case of Dhrangadhra Municipality (supra). In the instant case, there is no pleading to the effect that the incidence of tax has not been passed on to the consumers. There is no pleading that the State will be unjustly enriched and that too at the expense of the petitioners. Therefore, on this ground also the petitions are required to be rejected.

21. It is submitted on behalf of the respondents that the petitions are not maintainable. The petitioners have not pleaded nor proved any loss or injury on account of payment of excise duty. The petitioners have not made out any case for restitution and there is no cause of action in favour of the petitioners as provided under the provisions of Order 7 Rule 11 of Code of Civil Procedure. In support of this proposition reliance is placed on Division Bench judgment of this High Court in the case of Dhrangadhra Municipality v. Dhrangadhra Chemical Works Ltd., reported in 1988 (33) ELT 88 (Guj.) and in the case of Navsari Oil Products Ltd. Vs. Assistant Collector of Central Excise, . As indicated hereinabove, the petitioners have neither pleaded nor proved that they have suffered the burden of duty and that the State has been unjustly enriched.

22. Amending Act No. 40 of 1991 by which Section 11-B of the Act has been amended and Section 12-B along with other sections has been introduced has come into force with effect from September 20, 1991. This amended provision of law would apply to the facts and circumstances of this case. In this connection, reference may be made to the decisions of the Hon"ble Supreme Court in the case of Union of India and others Vs. Jain Spinners Ltd. and another, and in the case of Union of India and others Vs. I.T.C. Limited, . In the later decision (case of I.T.C. Ltd.,) the Hon"ble Supreme Court has reiterated the position of law laid down in its earlier decision (Jain Spinners" case). After referring to the provisions of the Central Excises and Customs Laws (Amendment) Act, 1991 (No. 40 of 1991) which came into force from September 20, 1991, the Hon"ble Supreme Court has held that the thrust of the amendment vide Section 11B(2) of the Act is that the refund of duty paid by the manufacturer can be allowed, if due, only in cases where the assessee has not passed on the incidence of such duty to any other person. Thereafter, the Hon"ble Supreme Court referred to Sub-section (3)

of the amended Section 11B which inter alia provides as follows:

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in Sub-section (2).

After referring to the aforesaid provision the Supreme Court negated the contention that the amended provisions of Section 11 -B can be applied only prospectively, i.e., to refund claims made after the introduction of the amendment and would not apply to pending cases and refund claim filed prior thereto. The Supreme Court held that even if the amount of refund was paid by the Department pursuant to order of the High Court, then even it could not be said to be final inasmuch as the appeal was pending before the Supreme Court and the amount was paid or ordered to be paid on certain conditions imposed by the High Court. The Hon''ble Supreme Court also held that since the order passed by the High Court directing refund was pending final adjudication by the Hon''ble Supreme Court when the amended provision of Section 11B(2) of the Act came into force with effect from September 20, 1991, the case would be governed by the amended provisions of the Act.

23. Similarly, in this case also presumption raised in Section 12B of the Act which was introduced by the amending Act No. 40 of 1991 would be attracted. Section 12B of the Act reads as follows:

Sec. 12B. Presumption that the incidence of duty has been passed on to the buyer: Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

The rebuttable presumption created by the aforesaid provision has to be rebutted by the manufacturer who has paid the duty. The burden of proof is on the person claiming the refund to establish that he has paid the duty but not passed on the burden of duty to the buyer of such goods. In the instant case, there is no even an averment in the petition, nor it is argued that the petitioner has not passed on the full incidence of such duty to the buyer and that the petitioners themselves have suffered the incidence of duty. In view of this settled legal position the prayer for refund made and the request to exercise powers under Articles 226/227 of the Constitution of India to allow the refund claim cannot be granted.

24. Learned Counsel for the petitioners has tried to distinguish the decision of the Hon''ble Supreme Court on following points:

It is submitted that in the cases before the Hon''ble Supreme Court, i.e., Jain Spinners (supra) and I.T.C. Ltd. (supra), the assessee had filed writ petitions in the High Court on merits challenging the orders passed by the departmental authorities, against the respective petitioners. There the prayer was for getting the claims adjudicated upon by the High Court on merits, while in the instant

case, according to the petitioners, they have filed the petitions for getting the order passed by CEGAT executed. This cannot be said to be any distinction whatsoever. As held by the Hon''ble Supreme Court, in view of the provisions of Section 11-B(3) of the Act, pending claims of refund were covered by the provisions of Section 11-B(3). As indicated hereinabove the petitions filed by the petitioners cannot be said to be petitions for seeking execution of the order passed by the appellate authority. Even if the petitioners'' contention is accepted that the petitions were for seeking execution of the order passed by the appellate authority, then also the amount of refund is paid to the petitioners as and by way of interim arrangement. Interim order made by this Court is subject to the final order. In view of the decision of the Hon''ble Supreme Court in the case of Jain Spinners (supra) and in I.T.C. Ltd. (supra), after amending Act No. 40 of 1991, even the High Court has no jurisdiction to pass any order of refund.

25. It is sought to be contended that the refund claim made by the petitioners has been finally concluded by the order passed by the departmental authorities pursuant to the interim order dated February 19, 1990 passed by this Court in each petition. This contention can never be accepted. The order of refund passed is subject to the final order that may be passed by this Court in all the petitions. Interim orders that may be passed by the Court are always subject to the final orders that may be passed by the Court at the time of final hearing of the case. Moreover, in all these cases, this becomes evident by the fact that the Court imposed condition of filing undertaking in each case by concerned petitioners Company and its Directors to the effect that they shall restore the amount to the respondent in case they lose in the petition. The petitioners have filed such undertakings also. Now it is not open to them to contend that grant of refund amount be treated as final. They are estopped from raising such contention.

26. Whether refund claims have been physically verified by the Department and then the amount is paid, or without verification, is of no consequence. The claim made by the petitioners for refund of the amount of duty paid by them on account of wrong classification of the article manufactured by them was not finally decided by this High Court. Final adjudication of the petition was pending when the amount was paid. Moreover, the question with regard to correct classification of the article, i.e., decorative laminated sheets, is still pending before the Hon''ble Supreme Court by way of appeal Nos. 3182 to 3202 of 1990. There is no substance in the submission that the decision laid down by the Hon''ble Supreme Court in the case of Jain Spinners (supra) and ITC Ltd. (supra) would not be applicable to the case of the petitioners and that the doctrine of unjust enrichment provided under the Act cannot be invoked in the case of the petitioners.

27. This brings us to the question of giving appropriate direction with regard to restoration of the amount received by the petitioners on the basis of the interim mandatory direction given by Division Bench of this Court. Once the petitioners fail, they are bound to refund the amount. The petitioners have utilised the

amount since the date of receipt of the same by them, to which they were not entitled to. As per the underlying principles governing the provisions of restitution (Section 144 of the Code of Civil Procedure), it is the obligation of the Court to see that the party which may have received the benefit of the orders of the Court be asked to restore the same to the other party. The Court is duty bound to place the parties in the position which they would have occupied but for such order. It may be noted that granting of restitution is not discretionary. The words "so far as may be" occurring in the section are empowering the Court and they do not confer discretion on the Court. The underlying principle of doctrine of restitution is that on reversal of a decree or order, the law imposes an obligation on the party who received the benefit of the erroneous decree or order to make restitution to the other party from what he has lost. In proceedings to which provisions of CPC apply, interest is part of the normal relief given in restitution. We do not see any reason why this principle of restitution which governs the proceedings to which the provisions of CPC apply, be not applied to the proceedings in which writ jurisdiction of the High Court under Article 226 of the Constitution of India is invoked. The Court cannot permit any party to suffer on account of its order. It is settled principle of law that no one should suffer on account of the orders of the Court. It is one of the first and highest duty of the Courts to take care that the act of the Court does no injury to any of the parties.

28. In this connection reference may be made to a decision of the Division Bench of the Delhi High Court in the case of Parekh Prints Vs. Union of India, . In that case, the petitioners who were job processors doing job work of cotton/man-made fabrics had obtained interim relief at the time of filing of petition under Article 226 of the Constitution of India. As per the interim relief granted, they did not pay part of the amount of excise duty which would have been otherwise payable by them. The High Court rejected the batch of petitions, and while considering the question of restitution, in para 42 of the reported decision, *inter alia* observed as follows:

We find that for the petitioners perhaps litigation is business. After getting interim orders they find they are nothing to lose except in the shape of fees payable to Counsel. They have collected additional duties of excise from the ultimate consumers but have not repaid the same to the credit of the Central Government and they thus utilised half of the duty so collected for their own purposes.

After making the aforesaid observation, the Division Bench of Delhi High Court considered the question as regards absence of any direction with regard to payment of interest at the time of passing interim order, and it is observed:

Though when the interim orders were made there was no direction of payment of interest but we find that under writ jurisdiction we have such powers to bring the parties to the same level once the petitions are dismissed and interim orders vacated. Petitioners must restore the advantage they got to the detriment of the public revenue and to which advantage they were not entitled as we have held

the petitions to be without any merit. Even otherwise, we have power to award costs calculated in terms of interest at the rate and on the amounts and for the period above mentioned.

We are in respectful agreement with the aforesaid observations of the Division Bench of the Delhi High Court.

29. The Hon''ble Supreme Court in the case of Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd., , considered the question with regard to restitution as provided u/s 144 of the CPC and under the inherent powers u/s 151 of the Code of Civil Procedure. The Hon''ble Supreme Court has inter, alia observed that the provisions of Section 144 are only a part of the general law of restitution. It is not exhaustive. Jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands. The Hon''ble Supreme Court referred to its earlier decision in the case of Binayak Swain Vs. Ramesh Chandra Panigrahi and Another, , and reiterated the principles laid down therein. In that case the Hon''ble Supreme Court has inter alia observed that the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its earlier action had displaced them from.

30. In all these cases, in our opinion, if the petitioners are directed to refund the amount received by them with 18% interest it would meet the ends of justice. It may be noted that in the year 1990 when the petitioners obtained the interim relief from this Court, the bank rate of interest for commercial loans was to the extent of 21%. Moreover, the banks charge interest with quarter yearly rest. In view of this position when interest is awarded at the rate of 18% it would come to around 15% to 16% as far as bank loans are concerned. Therefore, if the petitioners are directed to pay the amount with 18% interest, in facts and circumstances of the case, it would be just and proper. Moreover, even the petitioners have considered rate of interest at 18% per annum as just and proper, and that must be the reason that the petitioners have claimed refund of the amount of excise duty with interest at 18% per annum. For this reason also we think that award of interest at the rate of 18% per annum would be just and proper.

31. In the result, all the petitions are rejected. Petitioners of Special Civil Application No. 959 of 1990 are directed to restore the amount of Rs. 1,36,84,418.65 ps. (Rupees one crore thirty-six lakhs eighty-four thousand four hundred and eighteen and paise sixty-five only) with 18% interest from the date of receipt till the amount is paid, within one month from today, i.e., on or before March 20, 1995.

32. The petitioners of Special Civil Application No. 960 of 1990 are directed to restore the amount of Rs. 60,34,350.65 ps. (Rupees sixty lakhs thirty-four thousand three hundred and fifty and paise sixty-five only) with 18% interest from the date of receipt till the amount is paid, within one month from today,

i.e., on or before March 20, 1995.

33. Petitioners of Special Civil Application No. 965 of 1990 are directed to restore the amount of Rs. 83,49,099.65 ps. (Rupees eighty-three lakhs forty-nine thousand ninety-nine and paise sixty-five only) with 18% interest from the date of receipt till the amount is paid, within one month from today, i.e., on or before March 20, 1995.

34. Petitioners of Special Civil Application No. 1112 of 1990 are directed to restore the amount of Rs. 95,30,104.24 ps. (Rupees ninety-five lakhs thirty thousand one hundred four and paise twenty-four only) with 18% interest from the date of receipt, till the amount is paid, within one month from today, i.e., on or before March 20, 1985.

35. Petitioners of Special Civil Application No. 5096 of 1990 are directed to restore the amount of Rs. 2,02,36,309.19 ps. (Rupees two crores two lakhs thirty-six thousand three hundred nine and paise nineteen only) with 18% interest from the date of receipt till the amount is paid, within one month from today, i.e., on or before March 20, 1995.

36. The Department will be at liberty to take all necessary actions as may be - "permissible under law to protect the interests of the Revenue and to see that the amounts are recovered. The Department will also be at liberty to enforce the undertakings furnished to this Court by the petitioners in each of the petitions. Subject to the aforesaid observation and directions, rule discharged with costs in each petition. Interim relief granted earlier stands vacated in each petition.

37. At this stage, Learned Counsel for the petitioners states that pursuant to the mandatory order passed by this Court the amount paid is less than what was prayed for in the relief clause. If that be so, the Department will verify the amount paid and will ensure recovery on the basis of the actual amount paid.

38. At this stage, the Learned Counsel for the petitioners requests that the aforesaid order vacating the interim relief and directing the petitioners to restore the amount with interest to the respondents be kept in abeyance for a period of two months so as to enable the petitioners to approach the superior forum, i.e., the Hon'ble Supreme Court, against the aforesaid judgment and order. Having regard to the facts and circumstances of the case, in our opinion, it would not be proper to grant the request as prayed for. Hence the request rejected.